No. 90-970

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LECHMERE, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Council on Labor Law Equality ("COLLE") is a voluntary national association of large and small employers formed to monitor the activities of the National Labor Relations Board, related developments under the National Labor Relations Act, and to provide support to employer interests on those issues which affect a broad section of industry. COLLE's formation recognizes the need for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the formation and interpretation of national labor policy.

In the instant case, the National Labor Relations Board entered an order fundamentally altering the expectation of exclusive use of an employer's property by ordering that non-employees be allowed to trespass on business property for non-business related purposes, thereby infringing not only upon an employer's two-dimensional (land and space) interest in preserving and protecting its property for its exclusive use, but affecting its business property interests in providing an economically attractive environment for its prospective patrons, ensuring for those

patrons a pleasing environment free from peddlers and other solicitors, protecting its own Free Speech rights, and ensuring its right to do business without direct interference.

The manner in which the legal issues under review are resolved by the Court is extremely important to employers throughout the nation. The Board's decision calls into question one of the principle features of the National Labor Relations Act ("NLRA") that is designed to foster and protect employees' freedom of choice. However, the Court of Appeals' reliance upon *Jean Country*, 291 N.L.R.B. No. 4 (1988), emasculates an employer's property interest and sweeps aside 35 years of caselaw originating from the Court that has articulated the importance of employer property interests beginning with *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956); *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), and *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

The decision below is a departure from the Court's prior decisions, misreads these decisions, and permits the Board to apply what on its face may appear to be a permissible application under the NLRA, but actually is operationally applied to ignore the Court's holding in *Babcock & Wilcox*. Once again "the Board failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees." *Babcock & Wilcox, Co.*, 351 U.S. at 113.

In *NLRB v. Southern Maryland Hospital Center*, 135 L.R-.R.M. (BNA) 2693, 2697 (4th Cir. 1990), the Fourth Circuit recently rejected the similar attempt by the Board to allow organizational activities of nonemployees upon its property when alternative means of communication are available. Hence we believe not only is the instant case ripe for review, but that a writ of certiorari is warranted due to an important diversity of opinion in the circuits.

For these reasons, it is within the interest of employers to assure that the Board's remedial authority is confined to its appropriate sphere and invoked under procedural strictures

sufficient to permit informed judicial review. Moreover, it has become painfully clear that it is too expensive for employer's to repeatedly challenge Board findings in the appellate courts when the deference given to the Board is so high. Hence, few cases will ever reach this Court for reconsideration by employers on principle alone.

The parties have thus far primarily focused on issues involving judicial review of administrative decisions and the power of the Board to amend its interpretation of the statute. However, COLLE believes that the issue presented in this case includes not only whether the Board's *Jean Country* analysis is the correct test, but whether as applied, *Jean Country* is manifestly inconsistent with *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware*.

COLLE is therefore properly concerned that if this Court does not hear this case, employer's will no longer be able to prevent consumer product picketing, area standards picketing or even war protests upon its property, for the Board's implementation of the Jean Country decision is the resurrection of the Court's now rejected functionality analysis in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

COLLE thus brings to this case a diverse perspective not presently represented. Therefore, COLLE's participation may assist the Court in obtaining full consideration of the public-interest issues.

ISSUE PRESENTED

Whether the court of appeals properly decided that the Board's determination that nonemployee organizational interests were superior to an employer's property interests in protecting its property and business, where the employer has articulated a non-discriminatory non-solicitation policy and where the Board found that the union had available alternative means of communication with petitioner Lechmere's employees, but that those means had not been effective enough, is substantially justified.

SUMMARY OF ARGUMENT

The Court's seminal decision in *Babcock & Wilcox* articulated the plain legal fact that an employer's right to be free from interferences upon his property must be respected unless the Section 7 right of employees established by Congress cannot be met by alternative means of communication. The issue was framed by the Court in terms of the *availability* of alternative means of union communication with employees, not whether those available means are *effective* or *not effective enough*, as used in the contemporary parlance of the Board. The balance between alternatives has always been used in constitutional analysis, not "effectiveness."

Since the right to property protected by the Fifth Amendment is constructed of a "bundle of rights" including the right to speak and to refrain from speaking, *Wooley v. Maynard*, 430 U.S. 705 (1977), the Board's complete failure to consider what a property right is when it is presented with questions concerning union access upon an employer's property, violates due process. In *Jean Country*, 291 N.L.R.B. No. 4 (1988), the Board alleges that it will follow the Court's decisions, but then adds to the language the "effectiveness" of communications test which the Court nowhere articulated. Furthermore, the Board has applied its *Jean Country* test in a wholesale manner to allow union access to employer property on the most minimal of union proof whenever the Board believes that *more effective* means are available. This construct of its jurisdiction is an abuse of discretion which should not require Court supervision every decade.

ARGUMENT

I. THE BOARD'S APPLICATION OF ITS *JEAN COUNTRY* ANALYSIS DOES NOT COMPORT WITH ITS HEADY LANGUAGE THAT IT FULLY CONSIDERS AN EMPLOYER'S PROPERTY INTEREST AS FUNDAMENTAL UNDER *BABCOCK & WILCOX, OF WHICH IT MISCONCEIVES*

The Board's decision in *Jean County* emasculates the Court's decisions in *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware*. In each of these cases, the Court repudiated the Board's attempt to allow intrusions onto private property. The Board's language in *Jean Country*, 291 N.L.R.B. No. 4, 129 L.R.R.M. (BNA) 1201 (1988), attempts to meet the Court's concerns. However, the result is the application of the Board's worn-out predilection for interfering with property rights. As a governmental agency, it is estopped from engaging in activity stripping fundamental rights of their essential character.

Amicus respectfully calls to the attention of the Court several cases in which the "accommodation" of Section 7 and property interests have turned. These cases demonstrate that the Board's *Jean Country* "test" is used in a fashion nowhere meeting the substantial burden established by the Court as necessary to breach an employer's property rights. We show these cases to urge the Court to review the instant case in light of the Board's nationwide abuse of its authority.

In *Jean Country*, the Board correctly observed that the rule in *Babcock & Wilcox* was that alternative means "must 'always' be considered" before the property right could yield to union access. 129 L.R.R.M. (BNA) at 1203. However, the Board reads the Court's concept that the employer can prevent access if "other available channels of communication" exist to the union, except where "the inaccessibility of employees makes ineffective the reasonable attempts to communicate," 351 U.S. at 112, to mean that access is permissible where there is "*no* reasonable alternative means" for the union to communicate. 129 L.R.R.M. (BNA) at 1203 (emphasis in original). "Inaccessibility" has been interpreted by the Board to mean "unavailable in the circumstances" rather then in its location sense used in *Babcock & Wilcox*. *Id.* at 1204.

The so-called "spectrum" of rights suggested in *Scott Hudgens*, was then swallowed by the Board: "we view the consideration of the availability of reasonably *effective* alternative means as especially significant in this balancing process." *Jean Country*,

129 L.R.R.M. (BNA) at 1205. Hence, to the Board, the cornerstone of the Court's repeated rulings turns not on whether other means are available to the union, *but whether the union was successful* ("effective") in conveying its message. This is not the property right balancing envisioned by the Court which must occur, since the LMRA specifically preserves the First Amendment right of employers in Section 8(c).

The Board's cases fall into two categories. First, where the *Jean Country* test is mouthed and the Board promptly finds that even in the presence of a substantial property interest the unions 'cannot communicate *effectively* unless it is right outside the employer's door.[1] Second, the Board will find that the nonsolicitation policy was not being enforced by the employer in every

[1]*Dolgin's*, 293 N.L.R.B. No. 102, 2131 L.R.R.M. (BNA) 1159, 1162 (1989) (area standards handbilling ordered on company property because union could not distinguish between customers, "thereby reducing the effectiveness of the handbilling"); *Butterfield Theatres*, 292 N.L.R.B. No. 8, 130 L.R.R.M. (BNA) 1113, 1116 (1988) (picketing at parking lot entrance simply "ineffective and/or unsafe"); *Red Food Stores*, 296 N.L.R.B. No. 62, 132 L.R.R.M. (BNA) 1164 (1989) (union agent testifies that area standards picketing at perimeter less effective then at the front door; Board finds this "not effective alternative"); *Sahara Tahoe Hotel*, 292 N.L.R.B. No. 86, 131 L.R.R.M. (BNA) 1021, 1024 (1989) (parking lot picketing necessary because home visits, radio, advertisements, newspapers, magazines, cab ads, and billboards not a "reasonable effective means to communicate"); *Target Stores*, 292 N.L.R.B. No. 93, 130 L.R.R.M. (BNA) 1331, 1333 (1989) (where nondiscriminatory access rule in place - area standards picketing at lot entrance found "generally ineffective" because it would "substantially dilute" union message); *Granco, Inc.*, 294 N.L.R.B. No. 7, 131 L.R.R.M. (BNA) 1325, 1327 (1989) (ULP picketing at edge of parking lot not "reasonable effective alternative means of communication"); *Little & Co.*, 296 N.L.R.B. No. 89, 132 L.R.R.M. (BNA) 1173 (1989) (picketing on 14th floor of office building necessary because union alleged it could not as effectively communicate outside of building entrance); *Mountain Country Food Store*, 292 N.L.R.B. No. 100, 130 L.R.R.M. (BNA) 1329, 1330 (1989) (shopping center with three shops - because union product boycott message could not fit on one picket sign, picketing at parking lot entrance "was ineffective").

case against prospective solicitors.[2] Both situations, reflected in the cases below, highlight the fact that the Board's ruling will improperly turn on a standardless consideration of what a property right is.

This lack of commitment to the Court's prior decisions is reflected in the lack of full consideration of *Sears, Roebuck & Co. v. San Diego County Dist. of Carpenters*, 436 U.S. 180 (1978), where the Court upheld state jurisdiction of trespass by union area standards picketers. In that case, the Court reviewed its *Babcock & Wilcox*, *Scott Hudgens*, and *Central Hardware* decisions in reexplaining that:

> the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a *heavy one* is evidenced by the fact that the balance struck by the Board and the courts under the *Babcock* accommodation principle has *rarely been in favor of trespassory organizational activity*.

Sears, 436 U.S. at 205 (emphasis added).

The Court also noted that access "has generally been denied except in cases involving unique obstacles to nontrespassory methods of communication with the employees," *Id.* at 205 n.41, and that "[o]f course, if Sears had initiated the proceeding before the Board, the location of the picketing would have been entirely

[2]*Karatjas Family Lockport Corp.*, 292 N.L.R.B. No. 92, 130 L.R.R.M. (BNA) 1289, 1291 (1989) (because employer allowed charity and civic use of property, union access required); *Montgomery Ward & Co.*, 288 N.L.R.B. 126, 127 (1988) (restaurant could not exclude union agents where other businesses allowed); *D'Alessandro, Inc.*, 292 N.L.R.B. No. 27, 130 L.R.R.M. (BNA) 1089 (1988) (Board overrules ALJ and finds shopping center access was discriminatory to unions).

irrelevant and *no question of accommodation* would have arisen." *Id.* at 201 n.32. This interpretation of the employer's right to protect his property by keeping off area standards picketers and even non-employee organizers is totally inconsistent with the Board's *Jean County* jurisprudence set forth above and reflected in the two decisions set out below.[3]

In *Sparks Nugget, Inc.*, 298 N.L.R.B. No.69, 134 L.R.R.M. (BNA) 1121 (1990), the Board ordered the employer to allow handbillers and picketers access to its property to communicate to customers entering through a private rear entrance: "BOYCOTT THE SPARKS NUGGET." The union did also picket at the front entrance, but because "the Section 7 activity [at the rear entrance] in question would be conducted no closer than approximately 40-50 yards from its intended audience...the effectiveness of the Union's message in terms of both its substantive impact and the number of customers potentially reached via picketing or handbilling would be substantially diluted, if not defeated, if this message were required to be conveyed to its audience only from the relatively remote alternative location." *Id.* at 1130. The only suggestion by the Board of balancing the employer's property interest was that "the public is extended a broad invitation - indeed, it is presumably encouraged - to come on to the respondent's property," and that the record did not show customers "would be significantly obstructed or interfered with by the presence of picketers or handbillers." *Id.*[4] This so-called *balance* emasculates every known form of protection given by the Court to property owners. The Board wrongfully consid-

[3]The Court in *Sears*, 436 U.S. at 200 n.31 (emphasis added), explained that "in deciding the unfair labor practice question, the Board's *sole* concern would have been the objective, *not the location*, of the challenged picketing. Hence, the Court has always envisioned that private property were almost fully inviolate unless the union is presented with "unique obstacles" to communication. *Id.* at 205 n.41.

[4]In *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) the Court affirmed that property does not "lose its private character merely because the public is generally invited to use it for designated purposes."

ers the content of the union's speech and the effectiveness of its communication, just as it did to petitioner Lechmere.

The *Sparks Nugget, Inc.* position is consistent with the Board's other rulings, such as in *Southern Maryland Hosp. Ctr.*, 293 N.L.R.B. No. 136 (1989), *rev'd in part and aff'd in part, NLRB v. Maryland Hosp. Ctr.*, 135 L.R.R.M. (BNA) 2693 (4th Cir. 1990). In *Southern Maryland Hosp.*, the Board granted cafeteria access to union officials despite the hospital's nonemployee access policy. The Fourth Circuit found that the Board had deviated far afield of the holding in *Babcock & Wilcox*. In the court's view the "ultimate question...is not whether organizational contact of employees is difficult but whether the difficulty can be reasonably overcome." *Id.* at 2697 (*quoting Hutzler Bros. Co. v. NLRB*, 630 F.2d 1012, 1017 (4th Cir. 1980)). The Fourth Circuit found the Board had "incorrectly utilized *Babcock & Wilcox*...consistent with other Board decisions that have declined to apply the *Babcock & Wilcox* test." *Id.* at 2698. The court rejected the Board's conclusion in the absence of evidence that the employer's policy was discriminatory.

The contrast is especially poignant in the recent Seventh Circuit decision in *Sentry Markets, Inc. v. NLRB*, 914 F.2d 113, 115 (7th Cir. 1990), where the court upheld union access to permit struck product handbilling on company property of the non-primary employer rather than on the street. This was permitted by the Court even though "[t]he *Board used no analysis* in coming to this conclusion...." (emphasis added). The Board had rejected normal communicative measures such as advertising, letters, and telephone solicitation as "ineffective, unsafe or too expensive." *Id.* at 117.[5]

[5]The Seventh Circuit made no mention of what Sentry Market's property interests were at all because "none of the parties challenge the Board's characterization of Sentry's property right in this case" as weak. 914 F.2d at 115.

Accordingly, the Board's interpretation in *Jean Country* is at odds with this Court's prior rulings.[6] It admits to balancing of property rights and speech based upon content and effectiveness which are impermissible under the First Amendment to the United States Constitution. For these reasons, a writ of certiorari should be issued to consider the Board's jurisdiction here.

II. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI TO FINALLY DRAW THE LINE FOR THE BOARD IN WHAT CIRCUMSTANCES THE BOARD IS EMPOWERED TO ORDER AN EMPLOYER TO PERMIT THE TRESPASS OF NON-EMPLOYEES UPON ITS PROPERTY, A REPEATED ISSUE OF IMPORTANCE UNDER THE ACT WHICH WILL OTHERWISE EVADE REVIEW

It is the position of *amicus curiae* that the position of the Board in *Jean Country* has and will continue to manifest itself in a manner which violates the intent of this Court in *Babcock & Wilcox*, 351 U.S. 105 (1956). *Amicus* recognizes that since the right to organize is at issue in this case, which may be the most important statutory right of all under the Act, if the Board is permitted the authority here, then it will be permitted that authority in other cases as well. This is because the Board's adoption of balancing rights upon a continuum will allow it to place the fulcrum wherever it may. But this analysis has never

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[6]Our research shows that the only limitation on the Board's otherwise 100% allowance of union access on an employer's property occurred where either the target for which there picketing is no longer present, *Federated Dep't Stores*, 294 N.L.R.B. No. 49, 131 L.R.R.M. (BNA) 1362 (1989) (no access where union attempts area standards pickets after the store is built); *Hardees Food Systems*, 294 N.L.R.B. No. 48, 131 L.R.R.M. (BNA) 1345 (1989) (no access where union has no Section 7 interest at all), or the union wants to block customer access: *Tecumseh Foodland*, 294 N.L.R.B. No. 37, 131 L.R.R.M. (BNA) 1365 (1989) (on one store-one lot situation, union could not picket directly in front of store door, but could in the parking lot) (Member Cracraft; dissenting).

been utilized by the Board before and is not a means to assess property rights in a meaningful way.

An employer's interest in protecting its property was first protected from the Board's authority in *Babcock & Wilcox Co. v. NLRB*. There, as here, non-employee organizers were permitted by the Board to engage in activities upon the employer's property, even in the face of a nondiscriminatory no solicitation policy. Id. at 107. It was the Board's position that unless access was ordered, "union representatives, if barred, would have to use personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees." *Id.* at 111. This position was rejected by the Court. It ruled that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distributions. In these circumstances the employer may not be compelled to allow distribution even under such reasonable regulations as the orders in these cases permit." *Id.* at 112. The possibility of access was left open by the Court "when the inaccessibility of employees makes ineffective the reasonable attempts to communicate with them through the usual channels...." *Id.*[7]

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[7]It is clear that the "inaccessibility" the Court had in mind, was the availability of alternate means of communication, and not whether the means themselves were effective. In *Scott Hudgens v. NLRB*, 424 U.S. at 534, the dissent by Justice Marshall highlighted the fact that "*Babcock & Wilcox* did not require resort to the mass media," by explaining in his footnote 6 that "[t]he only alternative means of communication referred to in *Babcock & Wilcox* were 'personal contacts on streets or at home, telephones, letters or advertised meetings to get in touch with the employees,'" (*quoting Babcock & Wilcox*, 351 U.S. at 111). Since the availability of those methods existed in that case, the Court determined that the employer's property right cannot be invaded when those methods are available to the union. Furthermore, the dissent's suggestion that *Hudgens'* demonstration of available union alternatives "are considerably more expensive," not as "likely to be effective as on-location picketing," and "inadequate" were rejected by the

Moreover, the distinction between access of employees and nonemployees is substantive. "No obligation is owed nonemployee organizers." *Babcock & Wilcox*, 351 U.S. at 113.[8] Accordingly, the Court told the Board it would accept an intrusion only "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id.* The Court never stated that the test was whether the union *effectively* reached their targets, but whether the union had *reasonable* means of doing so.

Sixteen years later, in *Central Hardware Co. NLRB*, 407 U.S. 539 (1972), the Court again reviewed an employer's property interests in a situation similar to Lechmere. In *Central Hardware*, the store was surrounded on three sides by a parking lot where the union nonemployee organizers solicited Central's workers. Because of complaints, Central enforced its nonsolicitation rule and at least one organizer was arrested for trespassing on the company's property. *Id.* at 541. This time, the Board held the company's no solicitation rule was "overly broad." Based upon the Court's decision in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) ("*Logan Valley*"), the Eighth Circuit enforced the Board's Order, which this Court then concluded did not apply. The Court reiterated that in *Babcock & Wilcox*, the Board's imposition of a servitude on the employer's property was improper because "the availability of alternative channels of communication made the intrusion on the employer's property rights ordered by the Board unwarranted." *Id.* at 544. Furthermore, the accommodation principle articulated in *Babcock & Wilcox* was required "only in the context of an organization campaign." *Id.* at 544-45.

Court majority. *Id.* at 533-34 Yet, the dissent's reading was adopted by the Board in *Jean Country*.

[8] *See Scott Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976) (different balance struck when persons are employees already on the employer's property).

The Board's error in *Central Hardware* was finding that because the employer allowed the public onto its property, this "diluted" the employer's interest. The Court strongly disagreed: "Before an owner of private property can be subjected to the commands of the First and Fourteenth Amendments the privately owned property must assume to some significant degree the functional attributes of public property devoted to public use." *Id.* at 547. Since this fact was the only one relied upon by the Board, in misreading *Logan Valley*, the Court found the Board's order "an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Id.* The case was allowed to be remanded for the Board to consider the question whether any reasonable means to communicate with the workers was available "other than solicitation in Central's parking lots." *Id.*

Four years later, the Court was imposed upon to revisit its rulings. In *Scott Hudgens v. NLRB*, 424 U.S. 507 (1976), union picketers were removed from a shopping mall owned by Hudgens, in which one store the union had a primary dispute. The Board found an unfair labor practice upon the conclusion that members of the public were invited to do business within the mall and therefore it was "immaterial whether or not there existed alternative means of communicating with the customers and employees of the Butler store." *Id.* at 511. Demonstrating that unlike *Babcock & Wilcox* and *Central Hardware*, the activity in Hudgens involved "economic strike activity," carried out by Butler's own workers, but trespassing upon the property interests of Hudgens, the Court refused to allow the Board to draw the line upon the existence alone of section 7 activity.[9] Hence, the line drawn "along the spectrum" between the LMRA right and

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[9] In distinguishing its decision in *Logan Valley*, the Court showed that there, in contrast to the hand-billing in *Lloyd*, "the picketing in *Logan Valley* had been specifically directed to a store in the shopping center and the pickets had no other reasonable opportunity to reach their intended audience." *Hudgens*, 424 U.S. at 517-18. "[T]he ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*." *Id.* at 518.

the property right required the Court to vacate the Board's opinion and remand for this inquiry of accommodating the section 7 and the property rights.

As represented in the case at bar, the Board has not followed the Court's *Scott Hudgens* analysis. Whether the Court believes the balance was properly struck by the Board in this case or not, certiorari should be granted to resolve this important question with which the circuit courts of appeal are in disagreement.

III. A DIRECT SERVITUDE ON AN EMPLOYER'S PROPERTY WITHOUT ANY CONSIDERATION BY THE BOARD THAT THE INTRUSION AUTHORIZED FOR UNION OFFICIALS IS CONTRARY TO THIS COURT'S PRIOR ADMONITIONS AND DEPRIVATION OF FREE SPEECH AND PROPERTY IS BEYOND THE BOARD'S JURISDICTION

It is beyond cavil that a landowner's right to exclude persons from his property is fundamental to the constitutional interest in and protection of private property. In situations where the government permits the invasion or intrusion upon private property, this Court has repeatedly held that the Fifth Amendment prohibits that exercise of authority without the payment of just compensation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

In *Kaiser Aetna*, the Corps of Engineers sought public access to an improved private marina under the River and Harbors Act. The Court found that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Id.* at 179-80. The Court rejected the argument that the regulatory action taken by the Corps was

insubstantial, because it "result[s] in an actual physical invasion of the privately owned marina." *Id.* at 180. Furthermore, the Court disclosed the extent to which the interest in excluding others is firmly anchored in the property right: "And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.*[10]

The difficulty with the Board's approach to private property in the instant case is that it fails to ever acknowledge what the right is constructed of. As the Court set forth in *Kaiser Aetna*, *supra*, the ownership of property entails a "bundle of rights." The Board however, refers to the right of property solely in an ownership context. This limitation was soundly rejected by the Court in *Loretto*, *supra*. In that case, the City of New York granted an easement for the local cable television company to install boxes and wires on every building in the city. The Court reiterated its consistently held view that although the government may regulate the use to which property may be put, a "taking" occurs where a physical invasion is granted. *Id.* at 430. In the context of limited permanent invasions, the Court held that "even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land," the action is unlawful. *Id.*

In arriving at these conclusions, the Court has shown that "several factors are particularly significant-the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action." *Loretto*, 458 U.S. at 432. In reviewing the application of the "easement of passage" involved in *Kaiser Aetna*, the Court in *Loretto* emphasized that although the matter involving the marina, "not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that

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[10]The Corps had argued that "the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property-the right to exclude others," by opening up its private pond to the ocean. *Kaiser Aetna*, 444 U.S. at 176.

physical invasion is a government intrusion of an unusually serious character." *Id.* at 433.

The Board has never undertaken to apply any proper balance between what may allegedly be called a temporary taking or limitation on the right of an owner to exclude certain persons to further his purpose to "obtain a profit" from his property in furtherance of its Fifth Amendment right to do business.[11] To date, this Court has allowed only a limited invasion of a shopping center parking lot under circumstances where the owner "had not exhibited an interest in excluding all persons from his property... - [which] 'cannot be viewed as determinative' [in other situations]." *Id.* at 434 (*quoting PruneYard Shopping Center v. Robins*, 446 U.S. 74, 84 (1980)). However, the owner's interest in a "relatively undisturbed" commercial use of property "is clearly relevant" in this case. *Id.* at 436. As the Court further noted, demanding that a stranger be allowed to enter private property "is qualitatively more severe that a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Id.* The Board's Order to petitioner Lechmere, fails this test, for it is unlimited in scope and duration. Petition App. B-27 ¶1.

PruneYard, *supra*, involved the scope of state law access to private property in the context of federal law accommodation.

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[11]The Court appears to distinguish between permanent takings with those that "do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." *Loretto*, 458 U.S. at 435 n.12. In this context, the Court found that the CATV company's "reliance on labor cases' for an authorization of access was "misplaced," because the access that could be allowed was limited in Central Hardware, 407 U.S. at 545, to organizers, at limited non-working areas, for the duration of that activity. This accommodation the Court stated was "limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." The Board's adopted Order against petitioner Lechmere is not so limited in length of time or specific place. Petition App. B-27. Nor does the Board undertake to apply the Court's *Babcock & Wilcox* holding to the fullest extent as discussed in Part II, *supra*.

The shopping center there covered 21 acres and received 25,000 persons daily. When high school students sought to gather petitions to Congress, they were ejected. The center had a nondiscriminatorily applied no-solicitation policy. 447 U.S. at 77, 78.

The Court found that the California interpretation of state constitutional rights was "literally a taking," but not unreasonable because PruneYard retained the right to "restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." Id. at 83. Furthermore, the record in *PruneYard* did not show that because of its size, that the expressive activity would "impair the value or use of their property as a shopping center," *id.*, or that the right to exclude others was in context "essential to the use or economic value of their property." *Id.* at 84.

We believe that the concurring opinions of Justice White and Powell in *PruneYard* demonstrate that the Court would not countenance an intrusion under the United States Constitution where the property is of a different character.[12] Specifically, the First Amendment would contain an important limitation on governmental rulings to require access to private property to allow the expression of views. It is incorporated in every property owner's property interests.

First, in Justice Powell's view, the decision in *PruneYard* did not apply to all shopping centers and that even large shopping centers might be able to demonstrate in the context of California law, that a private owner's undertaking to regulate the time,

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[12]While agreeing that the U.S. Constitution did not "forbid" California from adding an overlay to federal free speech and property rights in the context of that specific ruling, Justice White argued that "the Federal Constitution does not require that a shopping center permit distributions or solicitations on its property." *Id.* at 95. He furthermore observed that the owner's free speech rights in "other circumstances" would prevail. Justice White thus joined Justice Powell's concurrence in *PruneYard* also.

place, and manner restriction could "create a substantial annoyance to customers that could be eliminated only by elaborate and expensive" owner supervision, and thus, reset the balance. 447 U.S. at 96. Furthermore, the First Amendment principle gleaned from the "Live Free or Die" motto of New Hampshire in *Wooley v. Maynard*, 430 U.S. 705 (1977), "protects a person who refuses to allow use of his property as a marketplace for the ideas of others." *Id.*[13]

Therefore, First Amendment interests are directly involved where the government "forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself." *Id.* at 98. This is because the public is likely to become confused by identifying the expression occurring on the property as the view of the owner. "The mere fact that he is free to dissociate himself from the views expressed on his property, see *ante*, at 2044, cannot restore his 'right to refrain from speaking at all.'" *Id.*[14]

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[13]In *Wooley*, 430 U.S. at 714, the Court understood the First Amendment to include both the "right to speak freely and the right to refrain from speaking at all....A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (Citations omitted).

[14]The potential for personally unwelcome speech in commercial establishments is expressed well by Justice Powell, 447 U.S. at 99:

> If a state law mandated public access to the bulletin board of a freestanding store, hotel, office, or small shopping center, customers might well conclude that the messages reflect the view of the proprietor. The same would be true if the public were allowed to solicit or distribute pamphlets in the entrance area of a store or in the lobby of a private building. The property owner or proprietor would be faced with a choice; he either could permit his customers to receive a mistaken impression or he could disavow the messages. Should he take the first course, he effectively has been compelled to affirm someone else's belief. Should he choose the second, he had been forced to speak when he would prefer to remain silent. In short, he has lost control over his freedom to speak or not to speak on certain issues.

This opposition to views an owner feels are either morally repugnant or adverse to the business purpose under which he has invited certain members of the public, extends to every form of speech. It does not require that the owner object in order to preserve his own beliefs. As in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), where non-union workers are not compelled to state reasons why they object to union agency dues, owner's should not have to surrender their First Amendment views to the public or to specific strangers. Consequently, Justice Powell's concurrence in *PruneYard* stems from the fact that PruneYard did not present any argument that *Abood* supports the "right to exclude speakers from their property. Nor have they alleged that they disagree with the messages at issue in this case." *Id.* at 100, 101.[15] Hence, the First Amendment was not shown to be burdened in PruneYard's case.

The Board's decision in this case incorporates none of these considerations. Its "accommodation" of the Section 7 and property rights involved here stopped at finding that Lechmere's location "is commercial in character" and "that the impairment would not be substantial." Petition App. B-6. These conclusions fail to account for the fact that the property right articulated in *Babcock & Wilcox* is not broken by its commercial character or that the property right involves a "bundle of rights," which the Board must consider, including the First Amendment.

The Board's analysis in this case is therefore improper. Its utilization of the analysis set out in *Jean Country*, 291 N.L.R.B. No.4 (1988), is therefore not a permissible test under the U.S.

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[15]Justice Powell also viewed that these First Amendment precepts would prevail in cases arising under the labor law, causing rulings by the Board to be "presumptively unconstitutional" under *Abood*, *Central Hardware*, *Hudgens*, and *Babcock & Wilcox*. *PruneYard*, 447 U.S. at 98 n.2.

Constitution or the restrictions previously carved out in *Babcock & Wilcox* by the Court. Because this conflict involves precious rights essential to our economic and political system, certiorari should be granted.

CONCLUSION

WHEREFORE, *amicus curiae* Council on Labor Law Equality respectfully requests that the Court grant a writ of certiorari to the First Circuit to review these important questions and settle the circuit conflict.

Respectfully submitted,

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